

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOVAGOLD RESOURCES INC.

PLAINTIFF

v.

J. CAPITAL RESEARCH USA LLC.

DEFENDANT

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TRANSCRIPT OF ORAL ARGUMENT BY TELEPHONE
BEFORE THE HONORABLE PEGGY KUO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

August 11, 2021

THE COURT: This is an oral argument by telephone in the matter of NOVAGOLD Resources, Inc., versus J. Capital Research USA, LLC, docket number 20-cv-2875. Will the parties please state their appearances, starting with Plaintiff?

MR. GENENDER: Good morning, Judge. David Genender and Jordan Kazlow from Baker Botts on behalf of the Plaintiff, NOVAGOLD Resources, Inc.

MR. KORZENIK: And on behalf of Defendant, J. Capital Research, this is David Korzenik, and with me Terence Keegan and Zachary Press of Miller Korzenik Sommers Rayman.

THE COURT: Good morning, everyone. This is Magistrate Judge Peggy Kuo presiding. All right. We are here for an oral argument on two motions. There is a motion filed at ECF number 56 by the Plaintiff, a motion to compel, responses to various interrogatories and document requests, and then there is a cross motion by the Defendant at ECF number 60 for a protective order asserting a report is privileged.

So how I'd like to proceed is first, I'd like to see if the parties have any agreement -- or rather any disagreement on the law or the framework that we should be using. And then I would like to focus on the motion to compel and look at the specific interrogatories and document requests at issue and the responses. And in the course of the responses, I believe that the issue of the reporter's privilege will be discussed. So

1 why don't we start with the legal framework, just because I
2 like to understand if the parties agree or disagree about how
3 the Court should be looking at this. So Mr. Genender or Ms.
4 Kazlow, would you like to start?

5 MR. GENENDER: Yes, Your Honor. I think we do have a
6 slightly disagreement about the relevance of the pay-to-play
7 concept that is in the Burlinger (ph.) case, which is a federal
8 case, and the Murray (ph.) case, which is a New York State
9 case. We believe that is sort of a preliminary issue to decide
10 whether or not the privilege applies. We also, I believe, have
11 a disagreement about whether or not they have properly invoked
12 the reporter's privilege and met their burden of showing the
13 elements of it. But as far as the law as to what the
14 reporter's privilege under New York law, I don't think we have
15 a disagreement substantively about that, other than its scope.
16 We believe that the protection that -- for news is not nearly
17 as broad as the Defendant contests.

18 THE COURT: Uh-huh. Okay. Thank you for that.

19 And Mr. Korzenik or Mr. Keegan?

20 MR. KORZENIK: Yes. I'll just address this. One of
21 the things that concern me is that the Plaintiff seems to rely
22 on a number of cases that follow the Gonzalez (ph.) or the
23 federal privilege, which is a much more weaker version of that.
24 So the Burlinger case and several others that they rely on are
25 -- reflect the balancing of that weaker privilege. What is

1 important, I think, to emphasize here is that Section 79H is a
2 very powerful and potent privilege. It's been amended four
3 times by the state to strengthen it and to resist any efforts
4 and any judicial weakening of the privilege. And in some ways,
5 as with any privilege, it blocks disclosure of things that
6 would otherwise be relevant under -- and generally discoverable
7 under both state or federal discovery rules.

8 But it does -- I think we've met the foundational
9 requirements of it very clearly and that the affidavit of Anne
10 Stevenson-Yang, who is the research director and editor of the
11 article in question, shows that we are professional
12 journalists, we do this for gain, which is what the statute
13 requires. And it imposes two burdens. One, that the federal
14 privilege doesn't provide at all, and that is an absolute
15 protection against the disclosure of any confidential source or
16 any kind of confidential communication relating to the news,
17 and it defines news very broadly. And it requires as to
18 nonconfidential material a specific -- a showing of specific
19 particularized critical need.

20 And I must say that the Plaintiffs here have never
21 addressed that question. They've never challenged our
22 declaration by Anne Stevenson-Yang as to those foundational
23 elements of the privilege. There have -- they have no record
24 here to overcome this assertion of privilege. So you know,
25 they don't have a declaration. They don't challenge any

1 statement made by Anne Stevenson-Yang. There are no facts,
2 just generalized assertions of categories of need.

3 And those categories that they seek strangely enough
4 actually map in to the very definition of news, as the Second
5 Circuit has defined it when the Second Circuit has to read and
6 define 79H and what its subject matter is, and we'll get to
7 that as we hit the privilege. Some of it's almost the same
8 kind of language as in Baker versus Goldman Sachs and in the
9 HBO case. So again, it may seem to them troubling that they
10 can't get generalized requests, but that indeed is what the
11 privilege does. It prevents access to documents of this kind
12 absent a showing of specific particularized and critical need,
13 and they've come forth with none of that.

14 THE COURT: All right. So -- thank you. Let's go,
15 then, right to the specifics because I think on a motion to
16 compel, it's useful to see what's being asked for and what is -
17 - what has not been produced, all right? So let's start with
18 the interrogatories because that may go a little faster. Am I
19 understanding as you're seeking responses, Mr. Genender to
20 interrogatories 1, 2, 3, 5, and 6, correct?

21 MR. GENENDER: Yes, Your Honor. It -- my -- I'm
22 happy to go in that order. It might facilitate things to go
23 through the document request because I think those will --

24 THE COURT: Oh.

25 MR. GENENDER: -- sweep up some of the
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1 interrogatories. Some of the -- the --

2 THE COURT: All right.

3 MR. GENENDER: -- main issue on the interrogatories,
4 Your Honor, is we have some answers where it's -- the primary
5 people are this, or most of it is this, and we need a complete
6 answer. And in conference we were unable to get -- on either
7 of the sets of discovery, a statement that they are or are not
8 withholding information based on the reporter's privilege, and
9 we don't have any kind of a Rule 26(b)(5) log or explanation
10 other than this affidavit, so it might make more sense to start
11 with the request for production.

12 And just to give the Court the lay of the land on
13 what has and hasn't been produced, before 10:00 on Friday, we
14 had received on these requests four documents, all public, none
15 of them internal. At 10:00 on Friday last week, we got eight
16 more documents, one of them being the report at issue that's
17 the basis of the claim, the other seven being documents about a
18 pipeline that are all public. We have no internal emails,
19 notes, drafts, checks, or records of financial contributions at
20 all. So that's the lay of the land as far as what has and has
21 not been produced. I think the Court mentioned that in the
22 introduction.

23 THE COURT: Uh-huh. All right. So what you're
24 saying is even as of now, you've received only public
25 documents, not any of the private communications that you've --

1 that are part of what you're seeking here.

2 MR. GENENDER: That's exactly correct, Your Honor.

3 THE COURT: All right. Great. So let's -- I'll --

4 MR. KORZENIK: Your Honor, could I make one note. I
5 welcome Mr. Genender to the fray here, but I would point out
6 that he was not a participant in any of the prior discovery
7 events nor any of the meet and confers.

8 MR. GENENDER: I was not. Jordan Kazlow, who is
9 sitting here in my office, was and informed me of those facts.

10 THE COURT: All right. So let's move forward. So
11 the -- I will take you up on your suggestion, Mr. Genender,
12 that we start with the document requests. So the first
13 document request I think that is at issue is number 5, and this
14 is seeking documents that the Defendant possessed, reviewed,
15 read, or received in connection with the decision to focus on
16 NOVAGOLD, right? And here, the response is that the primary
17 documents that influenced the decision are described in the
18 answer to interrogatory 1, and they will be produced, and then
19 it says, if there are other documents that are willfully
20 responsive they are subject to the reporter's privilege.

21 So can you tell me, Mr. Korzenik, what happened with
22 yours here, and then what you're --

23 MR. KORZENIK: Well, there --

24 THE COURT: -- seeking to protect?

25 MR. KORZENIK: -- yeah. Yes. There are -- first of
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1 all, the -- I think that the Plaintiff is actually seeking
2 documents that would indicate -- or communications that would
3 indicate that some third party gave us a tip or some third
4 party urged us to do this. And if there were such things, we -
5 - we would assert privilege. But I just want to say that in
6 order to remove that mystery that there's no such documents.

7 The decision was described fully in our answers to
8 the interrogatory. It was a decision made initially by Anne
9 Stevenson-Yang, and she then communicated that internally and
10 discussed it with Tim Murray, who's the writer of the report
11 and an expert on and knowledgeable, has covered, has done on
12 other articles in the mining area, and so it was their
13 decision. So there's -- I'm going to say so much as to
14 indicate that there's no third party here. There's no mystery
15 here. It's described fully in our answer to the interrogatory,
16 and that's it.

17 And to the extent that there are internal
18 communications about that choice -- there may or may not be,
19 but I don't believe so -- they would be exactly the kind of
20 thing that comes under the definition of news as Baker (ph.) --
21 as the Second Circuit defines -- reads it and how -- as the
22 Second Circuit reads 79H and the -- I think it's Section 8
23 definition of news. And I'll later, when we get to other
24 points, read exactly what Baker says about that and what the
25 Second Circuit says about that. In fact, it's exactly that

1 type of communications about matters of public concern that
2 come under the privilege.

3 THE COURT: Uh-huh. Okay. So let me try to unpack
4 what you just described. So in the response to interrogatory
5 1, there is a description of Ms. Stevenson-Yang and Mr.
6 Murray's discussion or their -- the things that led them to
7 believe that this article was appropriate and was the genesis
8 of this report. And the -- so -- and you're saying that there
9 are some public documents here, and it says, "Defendant has no
10 objection to producing them." And then it says in the response
11 here, "If there are other documents, they're subject to the
12 reporter's privilege", so I can understand why there's some
13 lack of clarity as to what exists and what doesn't exist and
14 what's being produced and what isn't. So let's go back to my
15 initial inquiry, which is, did you produce documents in
16 response to this document request number 5, Mr. Korzenik?

17 MR. KORZENIK: Yes. And I --

18 THE COURT: Okay.

19 MR. KORZENIK: -- would -- I'd like to make one point
20 about that in terms of what we did. The report is a typical
21 report by, you know, analysts of companies based on the
22 publicly available materials. It's not a report that is based
23 on some insiders or other kinds of interviews. It really is a
24 report that's based on a -- evaluating NOVAGOLD's 10-year-old
25 feasibility study that is the foundation of its offering.

1 NOVAGOLD doesn't have a mine yet. It hasn't built a 300-mile
2 pipeline into Alaska. It hasn't mined anything. It just has a
3 feasibility study from 2011.

4 And we are -- and the -- it's -- it has applications
5 -- quite a few -- many applications that relate to running the
6 pipelines through Native American land, that relate to how they
7 handle arsenic and cyanide and other kinds of toxic materials
8 that they're going to store underground permanently once they
9 get this mine going, but they haven't started. So it's --
10 their statement is just a forward-looking statement and they
11 say that in their own papers about what they're doing, and
12 we're writing a critique of that forward-looking statement
13 saying, we don't think it's realistic; we don't think they can
14 do it at the prices that they're hoping to do. So our -- it's
15 a forward-looking statement about a forward-looking statement,
16 and it's pure opinion.

17 But the key thing is -- to this particular
18 interrogatory is that our report is based on publicly available
19 documents. It's our opinion and our evaluation of those
20 publicly available documents. Also looking at -- and we cite
21 them, and we quote them, other studies by governmental agencies
22 and other not-for-profits and so on. If we cite it, we produce
23 it. If we quote it, we produce it. If we relied on it, we
24 produce it.

25 But it -- the work that we did here is a forward-

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1 looking evaluation of a forward-looking plan that has not as
2 yet been implemented. So it's all about the future, and it's
3 all about opinion. So if we've relied on the document and we
4 cite to it, we certainly do present it and we have presented
5 them. And we had some difficulty locating some of the -- one
6 of the delay in it, we had some definitely locating some of the
7 public documents that were -- that appeared to be no longer
8 available online. But much of what we've done here is based on
9 -- is really relying on those public materials. We produced
10 them.

11 THE COURT: Uh-huh. All right. So Mr. Korzenik,
12 perhaps the problem is the way you have phrased the response
13 because you're using very hedging language and I heard Mr.
14 Genender raise issue as to that. So for example, the response
15 that the primary documents that influence the decision are
16 described in the response to interrogatory 1, and it doesn't
17 say that they're the exclusive document. And then it says,
18 "Defendant has no objection to producing them", and then you
19 don't state what, in fact, you are producing, all right? And
20 then you say, "If there are other documents that are
21 responsive, those are protected by the reporter's privilege",
22 but we don't know which documents you're talking about because
23 you don't know if they exist or not. If they don't exist --

24 MR. KORZENIK: Right.

25 THE COURT: -- then that's the end of the issue. But
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1 if you're saying you're not sure because you haven't really
2 done the search, then I don't know that any of us is in a
3 position to state, or for me, to decide, whether it should be
4 produced because I don't know what documents you're talking
5 about, so this part --

6 MR. KORZENIK: I understand.

7 THE COURT: -- of the problem here. Okay.

8 MR. KORZENIK: I understand your dilemma, so I want
9 to address this. If we relied on, as primary source material,
10 those documents -- but for example, if Anne sent a note to Tim
11 about her opinion about something or her reaction to it, then
12 that would be something on which Tim relied and used when he
13 was writing. But we say, and we say so strongly, that they
14 have no right to have access to that.

15 In other words, there are all kinds of things --
16 there are people who -- if we reached out to an expert, for
17 example, we had a one-hour expert that we called and we
18 disclosed that, you know. You -- they have these expert
19 agencies that you can call up. And we asked that expert to
20 opine on the feasibility study and that's a confidential expert
21 and that's a communication with that expert about the news and
22 it's privileged, and we do not intend to turn it over.

23 And I would say this, I would love to be able to use
24 the opinion of that expert to protect ourselves, but we made a
25 commitment to that expert to treat them confidentially, and

1 therefore, we must and will assert that privilege. So that's
2 our dilemma. In other words, I --

3 THE COURT: All right. Okay. Could I --

4 MR. KORZENIK: So -- but I --

5 THE COURT: -- just interrupt you for --

6 MR. KORZENIK: -- the dilemma is, if I disclose
7 things to you, those are things that are within the privilege.
8 And I understand the difficulty there, but that's --

9 THE COURT: Yeah. So we'll --

10 MR. KORZENIK: -- what the privilege permits us to
11 do.

12 THE COURT: Unfortunately, Mr. Korzenik, the Federal
13 Rules of Civil Procedure foresee this kind of dilemma and
14 provide an opportunity to -- or a way to deal with it. So you
15 -- what you need to do is to answer the question, which you've
16 only phrased here conditionally, "If there are other
17 documents."

18 So what you need to do is to create a log that
19 describes the things you're talking about without breaking the
20 privilege. So if you're saying that there are communications
21 between Ms. Stevenson-Yang and Mr. Murray and you can say those
22 we think are privileged under the reporter's privilege because,
23 you know, as you've argued, you're a news-gathering
24 organization so you're subject to the reporter's privilege.

25 These are communications between -- internally between

1 journalists or just a news-gathering process. It's privileged,
2 okay. Then you can describe that set of documents without
3 telling us what specifically is in it and then Mr. Genender can
4 make an argument as to why it's not covered and then I can make
5 a decision as to whether it is covered.

6 Then if you're saying you've consulted with an expert
7 again, don't just tell us who the expert is and don't tell us
8 what the contents were, but you can say we promised
9 confidentiality. All right. So then under 79H,
10 confidentiality, you've got the absolute privilege and that
11 would be how that piece is analyzed. But at the moment,
12 there's nothing here that --

13 MR. KORZENIK: Yeah.

14 THE COURT: -- allows --

15 MR. KORZENIK: I think we already have --

16 THE COURT: -- me to look at it.

17 MR. KORZENIK: We actually did -- yeah. I think we
18 did do that already. In other words --

19 THE COURT: Where is it?

20 MR. KORZENIK: -- I'm mindful of the rule. Well, for
21 example --

22 THE COURT: Where can I find it?

23 MR. KORZENIK: -- in our -- in the interrogatories,
24 we actually describe, for example, that expert and what we --
25 and that we --

1 THE COURT: Okay. But --

2 MR. KORZENIK: -- communicated with that expert. And
3 I don't --

4 THE COURT: Where's --

5 MR. KORZENIK: -- really want to say more about that
6 expert than I did. We have

7 THE COURT: Mr. Korzenik, I'm --

8 MR. KORZENIK: -- we obviously have --

9 THE COURT: Just -- Mr. Korzenik, let me just stop
10 you there --

11 MR. KORZENIK: Sure. Okay.

12 THE COURT: -- because I'm trying to decide whether -
13 - how to rule on the motion to compel a response to document
14 request number 5, and your response to document request number
15 5 doesn't enable to say whether you have properly responded.
16 That -- that's --

17 MR. KORZENIK: All I can say is I --

18 THE COURT: -- know -- I don't know what I'm supposed
19 to do with the action as given here because it's -- it strikes
20 me that it's not complete. Now, if you've produced -- you've
21 more fully answered it elsewhere, I would like you to point me
22 to that because on the face of your response to document
23 request number 5, it is not a full response.

24 MR. KORZENIK: I think that it is. I will say this,
25 the only communications that could possibly relate to that

1 decision to select NOVAGOLD as the subject of this report are
2 communications between Anne and Tim. There are -- we disclosed
3 some -- one person who's confidential who we wanted to, we
4 asked about, and we disclosed this about some comparable
5 companies, but it was unhelpful and it didn't guide us. There
6 was some --

7 THE COURT: Okay. Just point me, Mr. Korzenik, to
8 your privilege log and that will help me decide what your --

9 MR. KORZENIK: No. First of all, no.

10 THE COURT: Okay.

11 MR. KORZENIK: We will not do a log. We will
12 identify because the log --

13 THE COURT: Mr. --

14 MR. KORZENIK: -- is attorney-client privilege.

15 THE COURT: Mr. Korzenik.

16 MR. KORZENIK: Yeah.

17 THE COURT: Mr. Korzenik.

18 MR. KORZENIK: Yes.

19 THE COURT: You are required to produce under Rule
20 26, right?

21 MR. KORZENIK: A description.

22 THE COURT: Rule 5. Yes, a description. That's what
23 I'm talking about.

24 MR. KORZENIK: And what I'm saying is that I believe
25 that we've done so if you want us to re --

1 THE COURT: Then tell me where. Tell me -- but tell
2 me where it is. That's all.

3 MR. KORZENIK: In our response, in our response to --

4 THE COURT: To?

5 MR. KORZENIK: -- Request Number 5.

6 THE COURT: All right. I'm reading your response to
7 Request Number 5, all right. And it says --

8 MR. KORZENIK: And then the related Interrogatory
9 Number 1.

10 THE COURT: Okay. Interrogatory Number 1 talks about
11 Ms. Stevenson-Yang's trip to Alaska and then her discussion
12 with Mr. Murray. And there are four articles you talked about
13 here. And he had -- there were some internal discussions.

14 MR. KORZENIK: Correct.

15 THE COURT: All right.

16 MR. KORZENIK: That's it.

17 THE COURT: So now, so did you -- did you because
18 document request number 5 is a request for documents. Did you
19 produce those documents? I know you've identified them, but
20 did you produce them?

21 MR. KORZENIK: I believe that we have. That was our
22 intention to have done so, and I believe that we have.

23 UNIDENTIFIED SPEAKER: Judge, we have --

24 MR. KORZENIK: If we haven't, if we haven't, we would
25 produce them.

1 THE COURT: So, okay. So have you -- so those were
2 the documents that were produced, the public available
3 documents that were produced on Friday; is that right?

4 MR. KORZENIK: Correct.

5 THE COURT: Okay. So then --

6 MR. KORZENIK: And before then, before then, we were
7 just completing --

8 THE COURT: All right.

9 MR. KORZENIK: We were doing what -- we were trying
10 to complete those.

11 THE COURT: Great. So then that takes care of the
12 first part of your response. Now the second part of your
13 response says, if there are other documents that are arguably
14 responsive to this request, they are subject to the reporter's
15 privilege, all right. And then I don't know, number one, if
16 there are other documents because you don't state yes or no,
17 and if they don't, then that's the end of the issue and we
18 don't have to talk about it anymore. But if there are, then I
19 need to know what they are. Again, don't tell the contents.
20 I'm not interested in the contents, but I need to have enough
21 of a description to understand whether they are subject to the
22 reporter's privilege because here I don't -- I don't know what
23 documents you're talking about. I've read your responses to
24 the interrogatories, but I don't see references there to
25 documents.

1 MR. KORZENIK: Uh-huh. I would say, Your Honor, one
2 of the difficulties there is just the vagueness of their own
3 request, but no, I don't really think that there's anything
4 else here.

5 THE COURT: Okay. Then if your response --

6 MR. KORZENIK: In other words, I don't -- in other
7 words, we made this early choice. We made it on our own. I
8 mean, I shouldn't even be disclosing this to anybody. But we
9 made this choice. It's an internal decision. It's an internal
10 editorial deliberation. It's an internal editorial process.
11 And you're asking me to sort of say what it gives --

12 THE COURT: So, Ms. Korzenik --

13 MR. KORZENIK: And I'm -- and I'm choking on that
14 because I don't feel --

15 THE COURT: Okay.

16 MR. KORZENIK: -- that that's really right.

17 THE COURT: All right. But --

18 MR. KORZENIK: I'm trying to be as open and
19 forthcoming as I can --

20 THE COURT: All right.

21 MR. KORZENIK: -- without losing that privilege.

22 THE COURT: Okay. Let's --

23 UNIDENTIFIED SPEAKER: Your Honor, Your Honor.

24 THE COURT: Hold on. Hold on. Wait a sec. Wait.
25 Hold on a second.

1 UNIDENTIFIED SPEAKER: Sure.

2 THE COURT: Mr. Korzenik, all argument is an
3 opportunity for the parties to tell me their side of the case.
4 It is not an opportunity to argue with the Court when I express
5 a concern. If you don't want to give me any information, I
6 will make my ruling, and if the ruling is compelling you to
7 respond or to produce a privilege log, then that's how it's
8 going to be, all right. So I'm just giving you the opportunity
9 to tell me why or and how it is that this response is
10 responsive and complete and that's it. We're going to move on,
11 okay? So --

12 MR. KORZENIK: But I view it as a complete
13 description -- it's a -- go ahead.

14 THE COURT: Okay. That's fine.

15 MR. GENENDER: Thank you, Your Honor.

16 THE COURT: I'm hearing -- I hear you.

17 MR. KORZENIK: Terence --

18 THE COURT: I hear you, so Mr. Genender.

19 MR. KORZENIK: Terence has one comment on it since he
20 was closer to some of the production.

21 MR. KEEGAN: I apologize, Your Honor, for trying to
22 break in.

23 THE COURT: Well, people cannot be talking over each
24 other. I don't know why you're talking over each other. Who
25 is Terence?

1 MR. KORZENIK: Terence is my --

2 MR. KEEGAN: Terence Keegan, Your Honor. And I
3 apologize. I don't mean to interrupt anybody.

4 THE COURT: All right. Go ahead.

5 MR. KEEGAN: But I did hear what Your Honor is saying
6 about a privilege log and I wanted to just address that
7 specifically.

8 THE COURT: Mr. Keegan, what do you want to say?

9 MR. KEEGAN: Just on the comment of a privilege log.
10 That is not something that specifically came up with any of our
11 meet and confers with opposing counsel, but be that as it may,
12 we're talking about it now and I understand that. That the
13 concern here and the risk is that preparation of a privilege
14 log and production of a privilege log would violate the
15 reporter's privilege itself. And that is a concern that's been
16 addressed in prior cases. For example, the Cosby (ph.) case
17 that we cited in our brief.

18 I can point you to the judge's ruling on that,
19 finding that there was no waiver of the privilege by the movant
20 there failing to provide a privilege log. And the judge in
21 that case said, I quote, I do not believe that the submission
22 of a privilege log would serve a useful purpose in the context
23 of this case where it is crystal clear that a party is seeking
24 in the production of materials that falls within this shield
25 law. That is to say, unpublished materials collected by

1 professional journalists in the context of news gathering.

2 I'm happy to follow up with Your Honor and provide
3 you with that specific cite, but again, it's the case material
4 that we've provided in our brief already.

5 THE COURT: All right. So are you telling me that
6 the argument you're making is exempt from Federal Rule of Civil
7 Procedure 26(e)(5) that says that you must describe the nature
8 of the documents not produced and do so in a manner that
9 without reviewing the information itself privileged or
10 protected will enable other parties to assess the claim?

11 MR. KORZENIK: No, no. You're --

12 MR. KEEGAN: That's it, Your Honor. Without
13 revealing the nature of the material. That's the dilemma that
14 we're facing.

15 THE COURT: This is what I'm asking you to do. This
16 is what I'm asking you to do. This is what I've been asking
17 you to do for quite some time this morning.

18 MR. KEEGAN: I -- I --

19 THE COURT: And perhaps you don't like the use of the
20 word privilege log, but 26(b)(5) has been invoked and I'm just
21 asking you to tell me without reviewing the information itself,
22 enough information that will assess -- what will enable the
23 parties to assess the claim. And I don't know, as I said
24 repeatedly, and I'm not really sure why you're not
25 understanding this. When you say if there are other documents

1 that are arguably responsive, they are subject to the
2 privilege, I do not know what documents you're talking about.

3 MR. KORZENIK: Okay. Your Honor --

4 THE COURT: And I wouldn't want the contents, but if
5 you don't tell me -- so, number one, are there such documents?
6 Let's start there.

7 MR. KORZENIK: Yes, there are communications between
8 Anne and Tim regarding their choice.

9 THE COURT: Okay. So and is that the only --

10 MR. KORZENIK: Their selection. And we think that --

11 THE COURT: Is that the -- that's great, so thank you
12 for that.

13 MR. KORZENIK: That's all that there could.

14 THE COURT: Okay.

15 MR. KORZENIK: That's all that there could be because
16 --

17 THE COURT: If -- let me talk.

18 MR. KORZENIK: Here's one other thing, Your Honor.

19 THE COURT: No, please don't interrupt.

20 MR. KORZENIK: This is real --

21 THE COURT: Don't interrupt. Let me try to
22 understand. Number one, you have said one category of
23 documents are the communications between Ms. Stevenson-Yang and
24 Mr. Murray. Are there other categories?

25 MR. KORZENIK: I don't think there could be and but -
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1 -

2 THE COURT: Okay. That's fine. So it's --

3 MR. KORZENIK: And the way that I know that is by
4 reading their --

5 THE COURT: Can I just -- can I just stop you there
6 because I'm just trying to get my arms around. I don't need to
7 know the reasons why they exist or don't exist. I just want to
8 know if they exist or not, all right. This is why it's very
9 difficult for me to make a decision on this case because I'm
10 not getting the information in a clear way that helps me
11 understand what we're talking about. So if the only category
12 of documents that might fall, might possible, and in the -- if
13 there are other documents that are arguably responsive
14 category, the only documents that you've identified are
15 communications between Ms. Yang and Mr. Murray and no other,
16 then that's great. Then that's all we're going to talk about,
17 so I just want to be clear.

18 MR. KORZENIK: That I'm --

19 THE COURT: Is that it? Are there more?

20 MR. KORZENIK: There are. I want to read their
21 demand, their request, number 5, and I want to show how it
22 falls directly within the category of privileged material by
23 its own terms. All documents that you've possessed, reviewed,
24 read, or received in connection with your decision to focus on
25 NOVAGOLD as the subject of the report or that influenced such

1 decision. Now that is, just by its own terms, a request for
2 internal editorial process and the exercise of editorial
3 judgment. I should not have to describe anything further than
4 to read that provision in order to know that it seems
5 privileged information.

6 And the other thing that's rather crucial here is
7 what the Second Circuit followed in the HBO case that basically
8 says that the burden's not on us to show that something is --
9 that it's news. And the burden's on them to show, to make a
10 clear and specific showing so that the Second Circuit said,
11 since the Respondent does not know what is actually contained
12 in the outtakes, she cannot factually assert that the footage
13 is highly material to her defense. And that kind of statement
14 by the Second Circuit when it applies 79(h), it is the key
15 language that described the burden that this Plaintiff has
16 never, ever attempted to meet.

17 But if their demand -- and this is my closing point.
18 If their demand seeks privileged information, if it seeks news
19 as it's defined by 79(h) and by the Second Circuit, then
20 there's nothing further that need be disclosed or logged or
21 described. They described it themselves as being news.

22 MR. GENENDER: Judge, if I could be heard. It's
23 David Genender for the Plaintiff.

24 THE COURT: Yes, Mr. Genender.

25 MR. GENENDER: Thank you, Judge. They've already
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1 identified non-privileged material responsive to this. The
2 burden of establishing an exemption from discovery falls on the
3 party responding. The language which I heard Mr. Korzenik read
4 doesn't trump Rule 26(b)(5). And this is this frustration we
5 had. And Mr. Korzenik's right. I was not on those prior
6 calls, but Ms. Kazlow is and she assures me and Jordan can
7 speak to, that the issue of a privilege log came up repeatedly.
8 And we heard the same argument that we heard today, which is we
9 can't do a privilege log because that would violate the
10 reporter's privilege. It's like saying a privilege log would
11 violate the attorney-client privilege, but we know that's not
12 true. Those get produced all the time.

13 And that is the frustration we had. And we thought
14 coming into this the answer was there are no documents. And I
15 thought at the beginning, Mr. Korzenik said that, there may or
16 may not be. Now we find out there are documents eight months
17 after the fact. There is not a single reference in the
18 declaration of Ms. Yang to support the privilege. And I fear
19 what's going to happen is we're going to get a privilege log
20 and we're going to end up back in front of the Court. And that
21 may be necessary. I understand the dynamics of it. But it's a
22 little frustrating that they've had eight months to do what
23 Rule 26 requires them to do. And we have advised them of it
24 and they just refuse to. And we're here taking the Court's
25 time. We've used -- I don't know if it's a third or a sixth of

1 the time that we have allocated on one request.

2 MR. KORZENIK: I would say that what you've just
3 described it utterly untrue. And it also ignores the fact that
4 your requests have, virtually every single one of them, sought
5 internal news material, communications about matters of public
6 concern that the reporters are covering. Every request does
7 that. They track the definition of news peculiarly. And so
8 what am I supposed to do? A lot for a request that asks for
9 news? Am I supposed to do a log for a request that asks for my
10 internal communications about the choice? Those are
11 privileged. I don't need to do a log for that. Your request
12 impunes itself. Your request insists of disclosure of what the
13 privilege itself defines as news.

14 THE COURT: So what I'm hearing you say, Mr.
15 Korzenik, is that in response to this document request, the
16 only -- other than the private -- the publicly available
17 documents that you have produced, the other documents are
18 internal documents which are subject of privilege; is that
19 right?

20 MR. KORZENIK: That's correct.

21 THE COURT: Okay. Then that's all you needed to say.

22 All right. Let's move on then. So if we go to
23 document request number 6, this looks very similar. No, this
24 is between -- sorry. This is communications between the
25 Plaintiffs and the Defendants. And it -- the response is that

1 there was an inquiry to the Plaintiff by the Defendant from Mr.
2 Murray and then there was a telephone conference and a
3 subsequent email. The email will be produced.

4 UNIDENTIFIED SPEAKER: Yeah, we're fine with that and
5 we've produced that --

6 THE COURT: Okay.

7 UNIDENTIFIED SPEAKER: -- whatever we have.

8 THE COURT: And then because there were no in-person
9 meetings and there may have been investor relation calls that J
10 Cap called into, so.

11 UNIDENTIFIED SPEAKER: Correct. We don't have --

12 THE COURT: All right. So how is this positioned,
13 Mr. Genender?

14 MR. GENENDER: Your Honor, two things. One, they
15 haven't produced the email, but we're not really fussing about
16 that. The internal communications about discussions with Mr. -
17 - between NOVAGOLD and Tim Murray. A document such as Tim
18 Murray told us the facts. We're going to ignore them and write
19 a story because we're getting paid to and our sponsor will make
20 money off of it is highly critical to the malice element. And
21 we don't know whether that document exists or not because they
22 haven't provided any description. It just says any --

23 THE COURT: What document?

24 MR. GENENDER: I'm sorry.

25 THE COURT: Which document?

1 MR. GENENDER: Document request number 6, Your Honor,
2 in the second --

3 THE COURT: Oh, no, no. Which? You said you don't
4 know which -- if any document exists. I meant what you --
5 which document you're referring to.

6 MR. GENENDER: I'm sorry. If there was a document,
7 an internal document --

8 THE COURT: Where?

9 MR. GENENDER: -- where they said --

10 THE COURT: Where did they say that?

11 MR. GENENDER: Yeah, where they said that. I don't
12 know if it exists or not. All they're saying is there are
13 other materials. I don't know what they are. I don't know who
14 they're between. I don't know what the subject matter is. I
15 have no way of assessing whether or not --

16 THE COURT: Okay. Mr. Genender, I'm puzzled by your
17 -- what you're saying because this response seems to be
18 responding.

19 MR. GENENDER: I'm sorry. The third sentence of the
20 response says any other materials relating to it are protected
21 from disclosure by the reporter's privilege. I don't know if
22 there are any other materials and I don't know what they are.
23 That's our concern here.

24 THE COURT: Relating to the email?

25 MR. GENENDER: Yes.

1 THE COURT: Okay. And so what I'm hearing and is
2 that Mr. Korzenik is saying that those other "other materials"
3 are internal documents that are discussions among the people at
4 J Cap.

5 UNIDENTIFIED SPEAKER: Right.

6 THE COURT: Rather than the communications between J
7 Cap and NOVAGOLD.

8 UNIDENTIFIED SPEAKER: Correct.

9 THE COURT: Okay. That was --

10 UNIDENTIFIED SPEAKER: Yes, Your Honor. Those would
11 be responsive to the requests.

12 THE COURT: Okay. Yeah. But they are -- exactly.
13 They're saying that that might be responsive to the request,
14 but they're asserting the report is privilege --

15 MR. GENENDER: Yes, and I don't --

16 THE COURT: -- and internal communication.

17 MR. GENENDER: And I don't have any way to test that.
18 I have no information about it. If, for example, there was a
19 communication that said, we got information. We're going to
20 ignore it and run a hit piece and do a short and distort, that
21 could exist and they could be asserting the reporter's
22 privilege over it. I have no way to assess it.

23 THE COURT: Right. Okay.

24 MR. KORZENIK: It doesn't.

25 THE COURT: Well, let's put a pin in that.

1 MR. KORZENIK: Just so that you're not -- yeah, you
2 don't get it.

3 THE COURT: Yeah. Let's put a pin in that and come
4 back to it when we talk about the reporter's privilege at
5 large.

6 MR. GENENDER: Okay.

7 THE COURT: But at least I can identify here that if
8 the documents being over which the privilege is being asserted
9 are internal communications, right? And so as far as the
10 subject of the request, which is documents reflecting the
11 communications between Plaintiff and Defendant, the scope of
12 those documents has been, I think, adequately explained. All
13 right.

14 So let's move on to 7, which is about communications
15 between the Defendant a third party, right. So it's a little
16 bit unclear, but now that we've had some discussion, let me try
17 to read between the lines. Are you asserting that, Mr.
18 Korzenik, some of these are subject to the absolute privilege
19 because they're confidential sources?

20 MR. KORZENIK: Yes, absolutely.

21 THE COURT: Okay. And are there non-confidential
22 sources?

23 MR. KORZENIK: I don't think so. I think they're
24 just internal.

25 THE COURT: Okay. So they're either internal or
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1 confidential.

2 MR. KORZENIK: Right.

3 THE COURT: And --

4 MR. GENENDER: And, Judge, just so that --

5 THE COURT: -- does everybody agree?

6 MR. GENENDER: Judge, I don't know if that's right or
7 not. When I look at the declaration from Ms. Stevenson-Yang,
8 pages -- page 6 under paragraph 17, C and D, they talked about
9 these communications and plainly says some of the materials
10 that J Cap has regarding NOVAGOLD are communications with
11 persons to whom J Cap has promised anonymity and
12 confidentiality. It presupposes there are some that are not.
13 And so I'm a little -- and I have no way of knowing looking at
14 the response to request number 7 what is what. And that's my
15 concern there. And it's the same with the internal documents,
16 which is paragraph D on page 6 with Ms. Stevenson-Yang's
17 declaration. She says some of the materials constitute
18 unpublished news, but there's no specification of what and
19 what's being withheld for us to assess it. That's our concern
20 there.

21 THE COURT: All right. So let me -- I'm just pulling
22 up that declaration. Which paragraph are you talking about?

23 MR. GENENDER: I'm sorry, Judge. It's document 61,
24 ECF61 at page 6 of 10.

25 THE COURT: Yeah. And I see subsection C and
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1 subsection D. Which one are you talking about?

2 MR. GENENDER: I was talking about subsection C with
3 respect to third-party communications. Some of the materials
4 that J Cap has regarding NOVAGOLD are communications with
5 persons who J Cap has promised anonymity and confidentiality.
6 And the analog on D, some of the materials, which presumably
7 are the internal materials that he's referring to, are
8 confidential. And we just have no way of telling what the non-
9 confidential is and what the confidential is. This declaration
10 suggests there is material that is not subject to the absolute
11 privilege. We just have no way of assessing it.

12 THE COURT: Uh-huh. So the use of the word some is
13 causing some issue.

14 MR. KORZENIK: I believe that those are either
15 internal or they're confidential third-parties. You've got to
16 realize that this report is a report that is our own opinions
17 about it. It's based on an evaluation of their feasibility
18 study and other government reports and filings that relate to
19 it, so it's not as if it's sort of an undercover or
20 investigated thing. We listened to calls. We did try to reach
21 out to NOVAGOLD. I just -- I think that when it comes to this,
22 they're either internal discussions or they are discussions
23 with confidential sources or commenters, and that's it.

24

25 ///

1
2 I think that when it comes to this, they're either
3 internal discussions or they are discussions with confidential
4 sources or commenters, and that's it.

5 MR. GENENDER: Judge, if --

6 THE COURT: All right. --

7 MR. KORZENIK: And by the way, if we did speak to
8 somebody else, you're still not entitled to it. In other
9 words, you need to have -- you can't just break it by saying
10 that you need some more. If anything that's going on here, we
11 don't have -- I mean, I don't think I need to say this, but I
12 -- we don't have any sort of undercover insider sources.

13 THE COURT: Well, so --

14 MR. GENENDER: Judge, if it's okay, I'm going to --

15 THE COURT: -- right. Let me just ask Mr. Korzenik.

16 So in Ms. Stevenson-Yang's declaration when she says
17 some of the materials that J. Cap has regarding NOVAGOLD in the
18 report are communications with persons with whom J. Cap. has
19 promised anonymity and confidentiality.

20 On its face, doesn't seem to say that there are also
21 communications with people for whom there has been -- there
22 has not been confidentiality promised, right?

23 MR. KORZENIK: Yeah.

24 THE COURT: Again, I'm just trying to get my arms
25

1 around what's excluded because when you use a word like "some",
2 then --

3 MR. KORZENIK: No. I understand.

4 THE COURT: -- what's the rest of it? So is the
5 rest of it --

6 MR. KORZENIK: I understand.

7 THE COURT: -- communications with people who have
8 not been promised confidentiality, or is it that the rest of it
9 is materials that are just internal and have nothing to do with
10 outside sources?

11 MR. KORZENIK: I think that the answer is that it's
12 either internal or it's confidential. We don't really --

13 THE COURT: Okay.

14 MR. KORZENIK: -- have a lot of sources, but you
15 know, the real -- you know, Plaintiffs in these cases are --
16 always are -- want a (indiscernible) test and find out what
17 the content is in order to determine if they need it or not.

18 And what I think David is doing here is really
19 seeking to kind of sift through our files to see if there might
20 be a statement as, oh, we're going to do a hit piece and really
21 blow these people apart, and we don't think any of this is true
22 but we're just going to hit them.

23 You know, I mean, this is fantasy, and they say they
24 already have, you know, some kind of -- that they have enough
25 to plead it. I don't think so. But you don't get -- if I'm

1 not required to show -- to say what the content of that
2 communication is, if I'm -- if we did speak to some third
3 party, and by the way we disclosed everybody who was in the
4 interrogatories. We disclosed everyone who was involved in
5 writing the report. If there's some third party --

6 THE COURT: All right. So --

7 MR. KORZENIK: -- I don't know who it is right now,
8 but --

9 THE COURT: Okay.

10 MR. KORZENIK: -- and I could look again, but I
11 think it's a waste of time.

12 THE COURT: All right. So let's do it this way. Do
13 you see, Mr. Korzenik, why some of the language being used is
14 causing a lack of clarity?

15 MR. KORZENIK: Yes. But I think that it's --

16 THE COURT: Okay. And some of --

17 MR. KORZENIK: -- but it's not -- it's lack of
18 clarity. I mean, here's the dilemma. Well, am I --

19 THE COURT: But here --

20 MR. KORZENIK: -- supposed to -- yeah. In other
21 words --

22 THE COURT: No. So this is what I'm trying to do,
23 Mr. Korzenik. I'm trying to help out here. I'm not the enemy.
24 All right?

25 MR. KORZENIK: I don't think --

1 THE COURT: So what I --

2 MR. KORZENIK: -- I don't think so.

3 THE COURT: Well, you're pushing back as if I'm
4 trying to hinder, okay? And I'm not. So --

5 MR. KORZENIK: All right.

6 THE COURT: -- I'm trying to figure out a way that
7 you can protect your privilege in the course of our discussing
8 it and yet get enough information so that everybody knows what
9 exists and what doesn't exist.

10 I find a very common problem in these discovery
11 issues is that it's not even clear whether something exists.
12 And if it doesn't exist, we don't have to spend so much time
13 talking about it. But if it --

14 MR. KORZENIK: Right.

15 THE COURT: -- exists, getting enough information to
16 know what we're talking about enables us to talk about it. So
17 I think you've now sufficiently clarified what was meant by the
18 word "some" in the declaration by Ms. Stevenson-Yang, and so if
19 you're telling the Court that there are either confidential
20 sources, right, or internal discussions, and those are covered
21 by the -- you're asserting the privilege, that's fine.

22 The question here was whether there were
23 nonconfidential sources that we need to think about. But
24 you're saying that it isn't about nonconfidential sources.
25 It's about internal discussions. Is that right?

1 MR. KORZENIK: I'll look at it again. I don't --

2 THE COURT: Okay.

3 MR. KORZENIK: -- can't imagine that there were.

4 There could have been idle --

5 THE COURT: Okay.

6 MR. KORZENIK: -- conversation, we're looking at
7 these guys, you know, what do you know about them? I don't
8 know anything about them. You know --

9 THE COURT: And here's it's about --

10 MR. KORZENIK: -- I don't know --

11 THE COURT: -- documents, so if you don't have
12 documents, you don't have to reconstruct that. It's about
13 documents. All right? But this is part of the -- their --
14 the language is being used in a way that is causing people to
15 think that there are gaps and my goal --

16 MR. KORZENIK: Right.

17 THE COURT: -- today --

18 MR. KORZENIK: I agree.

19 THE COURT: -- is to try to fill in those gaps.

20 Okay?

21 MR. KORZENIK: Right. I appreciate that. And I
22 would just ask Your Honor to be mindful of the fact that some
23 of those gaps are their problems, not mine. In other words --

24 THE COURT: Well, but --

25 MR. KORZENIK: -- it's just news --

1 THE COURT: -- it may be their problem in terms of
2 their burden but it is everybody's problem if we don't
3 understand what we're talking about.

4 MR. KORZENIK: Correct.

5 THE COURT: But this is all I'm trying to do is to
6 identify the gaps because language is not always precise, and
7 then to see where we go from there.

8 MR. GENENDER: Judge, maybe --

9 THE COURT: Let's move on to --

10 MR. GENENDER: Judge, just let me make one comment on
11 that. It's David Genender for the Plaintiff.

12 There's been a couple references to an expert service
13 and I presume a hired expert. That is an individual who if
14 they had promised confidentiality they could have put in their
15 declaration that specific reference or evidence of that. They
16 haven't done it. I don't know that when you go hire an expert
17 consultant through a service there's an expectation of
18 confidentiality and they certainly haven't proved it here.

19 When Mr. Korzenik was talking about producing all the
20 things that were quoted in the material, he left out the fact
21 that there's this unquoted, or unidentified source that they
22 quote. And there's nothing in the record so far that I've seen
23 that indicates that specific person who, by the way, they are
24 reserving the right to designate and disclose as an expert,
25 presumably after the close of discovery that supports hiding

1 his identity now.

2 And I don't know whether the right thing for the
3 Court to do is force them to do that or overrule the objection
4 but they plainly could have said there was an expert; he's an
5 engineer; he demanded confidentiality before he'd speak to us,
6 and that was part of our agreement with him. The record's bare
7 on that. And --

8 THE COURT: Well, but --

9 MR. KORZENIK: No. That's not -- it's there.

10 THE COURT: Mr. Genender.

11 MR. KORZENIK: It's in the --

12 THE COURT: Hold on.

13 MR. KORZENIK: Yes.

14 THE COURT: Please don't interrupt.

15 I think there was, in the interrogatory number 4,
16 which was not being -- was not part of the motion to compel,
17 reference made to the expert.

18 MR. GENENDER: There was. There was.

19 THE COURT: So all right. So you're not seeking to
20 compel on this interrogatory. Why are we talking about it?

21 MR. GENENDER: Well, if the document -- I thought he
22 just said there are documents that they relied on that might
23 have come from this expert.

24 MR. KORZENIK: No. There aren't. No. No.

25 THE COURT: Okay. So then that's it.

1 Let's move on. So request number 8 talks about a
2 document about research. And then it says here, "documents
3 responsive to the request", you're looking for all
4 communications with the anonymous industry professional. And
5 then the response is "the request for unpublished material is
6 overbroad" and then that "these documents are covered by the
7 privilege".

8 Okay. And then it says here about the one-hour
9 telephone call with an expert on the pipeline, expert materials
10 don't need to be produced as part of the fact.

11 MR. KORZENIK: Yeah. I mean, Your Honor, I'll just
12 address that. We would love to use the expert in our support
13 but we have an understanding with him and have said that in a
14 number of places that -- or her, that this is confidential,
15 and we have found that it would be great if that person would
16 be willing to step forward. We would love it. We'll beg them
17 to do it. But if they want to stay confidential, then we can't
18 do anything about that. And that's what we're going to honor,
19 that obligation.

20 THE COURT: Okay. All right. Great.

21 MR. GENENDER: And Judge, just on that point, again,
22 maybe I missed it. I don't see anywhere in interrogatory
23 response number 4 or in request number 8 where they identify or
24 state that there's a confidentiality agreement with the expert.
25 And if there is, that's great. I just think they ought to log

1 it and say it, that there was a mutual understanding of
2 confidentiality. I think that's what the law requires.

3 And if they'd told us that's what it was and there's
4 nothing else, we could have moved on, but we just don't have
5 that eight months after --

6 THE COURT: Okay.

7 MR. GENENDER: -- the requests are out.

8 THE COURT: Well, we're moving on now. So let's go
9 on to document request number 11. Actually, for 11, 12, and
10 13, the response was very clearly none, right?

11 So document request number 11 says there are no
12 documents.

13 And then request number 12, it says that there is
14 none or -- and also you know, slightly hedging but not
15 presently aware, but that's the standard anyway of being able
16 to say none, with an update if you become aware of any
17 documents. And then also, very unequivocally, J. Cap has no
18 trades in NOVAGOLD or any comparable mining company.

19 And the same thing for document request number 13, J.
20 Cap owned no NOVAGOLD securities and no brokerage accounts that
21 held NOVAGOLD securities.

22 So what more is there to compel there?

23 MR. GENENDER: Well, if that was the answer and they
24 hadn't continued to assert their reporter's privilege -- for
25 example, number 13, in all events they object to the request on

1 the grounds set forth in 1, 3, 4, 5, 7, and 9; 7, Your Honor,
2 is the reporter's privilege. I think the objections ought to
3 be withdrawn and if they learn of something down the road that
4 is responsive, that's subject to a privilege, they can amend
5 their answer.

6 That's all we've been trying to do is confirm there
7 are no responsive documents that are hiding behind --

8 THE COURT: It says that. It says that. So I think
9 we need to move on from that.

10 All right. So then let's look at document request
11 number 14, anybody who paid any money or considerations. So I
12 see here that the response is -- that all of this is just a
13 -- you're asserting the reporter's privilege, Mr. Korzenik.
14 Was there a yes or a no, nobody paid money for this, or you're
15 just saying whether anybody did or not is covered by the
16 privilege?

17 MR. KORZENIK: Well, this is where, you know, they
18 don't know what they're looking for or asking for. If the
19 person is a type of subscriber or a recipient who paid for it,
20 we've given our public distribution channels so they know what
21 those are. So we're not going to turn over subscribers or
22 recipients. That's confidential and it wasn't in the first
23 round of production, in any event.

24 If they're some kind of sponsor or paid for the
25 report in some way, that's not -- that's confidential and that

1 has nothing to do with this request. But if they are -- one
2 thing that is key here is they keep submitting to Your Honor,
3 and now their third letter, that they're looking to add
4 additional parties who they might be able to name.

5 And what they're really doing there is seeking pre-
6 action disclosure. And when you want to do that to find
7 somebody who is a funder in the sense of being a liable
8 publisher, then you're speaking of someone who's an anonymous
9 speaker.

10 Because people who pay money to publish something, if
11 that's what they're looking for, are anonymous speakers. And
12 when you do that then you have to follow what the law requires
13 to unmask such a funder or contributor or publisher, if that's
14 what they think this person is.

15 And you have to follow the Seeking Alpha cases that
16 we defended, and all successfully. You have to follow
17 Watchtower, the Supreme Court case on -- that recognizes
18 anonymous speech. So if a person -- and I don't like the
19 case, but Citizens United says that people who provide monetary
20 support to a publication is speech, and if it's anonymous,
21 they're entitled to be anonymous.

22 So if that's what they're looking for and they're
23 looking to name another party, which is what they probably are
24 trying to do, then you've got to answer that -- you've got to
25 jump that hurdle, and they haven't.

1 In other words, we've put it in our notice of motion.
2 We put it in our memo of law. We cited all those cases,
3 Nanoviricides versus Seeking Alpha. New York follows it,
4 California, Connecticut -- everyone follows this. They don't
5 address it. They don't provide a declaration that supports
6 their assertion here. They don't even address our legal
7 argument. They don't touch it. There's no record that would
8 permit them to get that kind of discovery.

9 So to the extent that anyone is communicating with us
10 about the report and the article, confidential. To the extent
11 that anyone, quote, funded it and doesn't want to be disclosed,
12 they're anonymous speakers. We've made that clear that if
13 that's what they think is going on here and that there's
14 liability, then jump the Nanoviricides, Watchtower hurdle.

15 But they don't bother. And what do you need to do to
16 jump that hurdle? You have to show that you have a cause of
17 action against that third party that is likely to be successful
18 on the merits. Did they even identify what their cause of
19 action is against that third party? Nowhere. Did they say it
20 in their complaint? Nowhere. Did they say it in -- did they
21 even name a third party or a John Doe? Nowhere.

22 So it doesn't appear in their complaint. It doesn't
23 appear in their response papers. They don't address our cases
24 at all. I think that's over.

25 MR. GENENDER: Judge, if I could be heard?

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1 THE COURT: Yes, please.

2 MR. GENENDER: So I think what we're seeing here
3 clearly is there's not a reporter's privilege being asserted
4 here. Mr. Korzenik is making a lot of suppositions about what
5 NOVAGOLD is going to do and what they're not going to do.

6 The reality is that this interrogatory, people who
7 fund the report, is directly relevant to whether or not they
8 actually are able to claim the reporter's privilege. This is
9 pay to play. This is the Berlinger case, which is a federal
10 case, but also the Murray (ph) case, which is a New York State
11 case that says if don't have as -- the amount of editorial
12 independence you have, which is affected by people who are
13 paying you to do something, goes to the degree and whether the
14 reporter's privilege even applies.

15 In addition to that, with respect to the claims in
16 this case against this Defendant, this document request is
17 directly relevant to actual malice. Were they so swayed by the
18 prospect of somebody funding them, giving them money to do this
19 piece, someone who might be out there preparing to short sell
20 the stock, that they were reckless and disregarded the truth
21 with respect to NOVAGOLD?

22 So the supposition about, well, they're going to try
23 to sue them is nice and all, but there's nothing in the record
24 to suggest that. What's in the record is that documents about
25 who funded and whether there's editorial independence is

1 relevant. And the reporter's privilege -- I didn't even hear
2 him argue with, but it plainly doesn't apply to this.

3 And there's a confidentiality order in place, a
4 protective order in place. So if they want to designate as
5 confidential, do so. And there's been no showing by them that
6 the funders wanted to remain anonymous although if they were
7 short sellers who were part of the scheme that we have alleged,
8 maybe they did, but I don't see it here. This one is the one
9 that they ought to produce and they should have produced months
10 ago.

11 THE COURT: All right. So let's move on.

12 MR. KORZENIK: The one thing that is --

13 THE COURT: What did you want to say, Mr. Korzenik?

14 MR. KORZENIK: No. Just that there's a procedure for
15 obtaining that kind of thing and they never addressed it.

16 THE COURT: Yeah. All right.

17 So let's move on to the last point, which is number
18 15, and that is the request for editorial process. So if the
19 reporter's privilege -- if in fact the Defendant is covered by
20 the reporter's privilege, then this would be covered, right,
21 because of editorial process?

22 Mr. Genender?

23 MR. GENENDER: Well, this is not necessarily the
24 process. So for example, the case that J. Cap cites from the
25 Second Circuit, I think it's the Geoffrey (ph), talks about the
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1 procedures. This is talking about the actual substance that
2 will go into the suggested edited revisions of this piece,
3 which goes directly to their knowledge.

4 As we've cited from -- I think it's the Athatron
5 (ph) case, which is a U.S. Constitutional case, but the logic
6 applies, that knowledge is relevant, especially when you've
7 alleged malice like we have.

8 So I do see their attempt to broaden the language of
9 that case to include this but that case itself was really more
10 talking about, you know, who were the people that did the
11 interviews? What are the processes and procedures? We want
12 the substance here. And as I believe Mr. Korzenik -- or
13 rather, shouldn't address him personally, as J. Cap pointed out
14 in their brief, you don't expand these protections because you
15 want to have there be a search for truth.

16 So if there are revisions and emails, we need to
17 change this because it's not going to have enough of an effect
18 on the stock price or we really need to focus him on this
19 because our funder wants us to really do -- again, Your Honor,
20 I'm making all this up. But these are all relevant types of
21 documents that are highly relevant to the claims that are made
22 in this case, and there's no other way to get them.

23 THE COURT: Okay.

24 MR. KORZENIK: May I address that?

25 THE COURT: All right. So --

1 MR. KORZENIK: Address speculation. You're telling
2 us --

3 THE COURT: All right.

4 MR. KORZENIK: -- that you're making this up and
5 it's speculation. And it is -- this request maps exactly into
6 Baker's Second Circuit description of news. It is evidence
7 that relates to the ability, efficiency, and diligence of the
8 reportorial personnel, their news-gathering methods generally
9 as applied in preparing the article, the witness' personal
10 knowledge and assessment of these matters.

11 So that goes to draft, as in HBO, outtakes,
12 everything. Those are -- your request maps right into the
13 definition of what is protected by 79H.

14 MR. GENENDER: And Judge, let me just --

15 THE COURT: All right. So let's -- I --

16 MR. GENENDER: -- we disagree.

17 THE COURT: I hear loud and clear that you disagree.
18 Okay. So let's do this. Now that we've gone through all the
19 document requests, let me try to make this discussion a little
20 more focused.

21 So my reading of the case law is that the Defendant
22 here qualifies as news, right? So just because it's a business
23 report and there's a subscription doesn't make it not news.
24 And even if there are other nefarious purposes, as Plaintiff is
25 alleging, it again doesn't make it not news because it is a

1 communication regarding events of public concern or interest
2 affecting the public.

3
4 ///

5 THE COURT: Right? Because it is a communication
6 regarding events of public concern or interest affecting the
7 public. And I think there's been some cases that I've found
8 where subscription services are found to qualify. So in light
9 of that, the privilege applies and we need to look at the
10 privilege itself. So we'll look at the Section 79-h. Clearly
11 if it's confidential that there's an absolute privilege. To
12 the extent that they were confidential first as identified any
13 communications there would be covered.

14 The question then becomes when it's not covered by
15 confidentiality and there's not an absolute privilege, then
16 there has to be a clear and specific showing by the asserting
17 party, so in this case, by the Plaintiff of the three parts,
18 right? Highly material and relevant, critical or necessary,
19 and then not obtainable from alternative sources.

20 The most I have seen so far is an argument that the
21 information is germane. And so I'm not sure what you mean by
22 germane, but that is not the same as material and relevant or
23 critical and necessary.

24 And then there are also pieces of what are being
25 asked for, which I think we've been able to clarify to the

1 extent that things don't exist, and if there are other things
2 that do exist, what the category is of things there. So for
3 example, I've heard Mr. Korzenik talk about internal
4 communications and asserting the privilege, the reporter's
5 privilege over those. And then the same thing with the
6 editorial content and process.

7 So I think the parties should take a look again at
8 what you're asserting here in light of my finding here that the
9 Defendant qualifies for the reporter's privilege and then to
10 make your showing, Mr. Genender, of what specifically you're
11 looking for and why you need it. Right?

12 There's some requests that are very broad. So for
13 example -- let me see if I can find one -- where the request is
14 for parties that the Defendant may have given information to.
15 And I am not entirely clear what the relevance is of that. And
16 then I don't know whether the privilege would apply to that.
17 It's just not clear because the requests are broad and I don't
18 know that you've really looked very carefully to focus on the
19 things you need.

20 And then once you've focused on what you need to make
21 those showing about -- it's not just material and relevant.
22 It's highly material and relevant. And it's not just would be
23 helpful. It is critical or necessary. Necessary, right, or
24 critical, which is close to necessary. And then the third
25 part, it's not alternative but it's an additional part. All

1 three of these must be met. Not obtainable from alternative
2 sources.

3 So if you want, we can go through each of these
4 categories in light of that. And Mr. Genender, if you want to
5 make those arguments now, I will hear you, or I will give the
6 parties an opportunity to go back to the drawing board and
7 write out what exactly you're looking for and how to meet these
8 tests.

9 Yes. Go ahead.

10 MR. GENENDER: The only thing I could think of,
11 Judge, that might help us along that lines is it seems like J
12 Cap has identified specific documents. And it might help us if
13 they were to identify them under Rule 26 as required so that we
14 could then see whether we need to pursue them or not. We're
15 trying to pursue that in conference despite faulty memories
16 about it. And we thought that was the right way to do it.

17 If we could get some sense of what it is that does
18 and doesn't exist, we could determine whether it's worth
19 fighting about. And that's kind of the frustration we've run
20 into in this process.

21 THE COURT: All right. So why don't we do this. And
22 again, I'm not asking the Defendant to reveal any privileged
23 information. And maybe we shouldn't talk about a privilege log
24 because that implies certain things. But if you can describe
25 the category of documents that you're withholding or that

1 you're asserting the privilege on, then at least the
2 conversation can be had in terms of how to do the analysis of
3 whether that category of documents is highly material and
4 relevant, critical or necessary, and not obtainable from
5 elsewhere, right?

6 And if it's something like, you know, internal
7 communications among the defense side, that's, I think, fine as
8 a category or communications with people who -- I mean, I can't
9 even make it up because I don't know what we're talking about.
10 Just so we can have the conversation about in what way these
11 documents may or may not be highly material and relevant,
12 critical and necessary, and not obtainable elsewhere.

13 Is that still not possible to do, Mr. Korzenik?

14 MR. KORZENIK: I mean, it's possible to -- I think we
15 already kind of covered the answers to it. There's certain
16 categories of requests that they've made where I just don't
17 even -- I'll go back and check, but there are only internal
18 conversations and there are only conversations with
19 confidential outsiders.

20 THE COURT: Okay.

21 MR. KORZENIK: You know, it's possible there's some
22 idle ones, but I mean --

23 THE COURT: Well, you can only be aware of --

24 MR. KORZENIK: -- this case.

25 THE COURT: -- what you're aware of, okay?

1 MR. KORZENIK: Yeah. But the other thing I would
2 say -- and this is what I would ask -- is that some of their
3 requests are asked and answered. And some of their requests
4 are so broad and they map into the definition of news. In
5 other words, sometimes they're asking us for our editorial
6 process and drafts and communications about it that would show
7 that we didn't care about the truth.

8 I don't need to do a log for that because their
9 request seeks nothing more and nothing less than privileged
10 material. And I don't think --

11 THE COURT: Right.

12 MR. KORZENIK: -- and they gave the description by
13 their request. And you know --

14 THE COURT: Okay.

15 MR. KORZENIK: -- I had a number of cases like this
16 in front of Judge Sweet (ph). He just took all of the city's
17 requests that were general and broad of the kind of that most
18 of the requests here are and just said I can't -- that's not
19 specific enough. That's no particularized need.

20 THE COURT: Well, this is part of what I'm saying.

21 MR. KORZENIK: Your Honor expressed the same view. I
22 think Your Honor expressed the same point that Judge Sweet did.

23 THE COURT: Which is why I have asked for there to be
24 a more particularized showing by the Plaintiff of what you're
25 seeking. All right?

1 MR. KORZENIK: Okay.

2 THE COURT: So I think the upshot of our discussion
3 and what I'm deciding today is that I'm going to deny the
4 motion to compel because based on the description -- based on
5 my finding or my conclusion that the Defendant is engaged in
6 news and so can assert the reporter's privilege and that there
7 have been no particularized showing, either, you know, there
8 are things that are confidential sources, and that's absolute,
9 or there has not been a showing by the Plaintiff of those three
10 things that they need to show under 79-h.

11 And so we've already gone through, for example, the
12 document request #15, which is editorial. And I've already
13 stated my view that it is completely covered by reporter's
14 privilege because it's editorial. So to go into details as to
15 what the editorial process is would not be necessary because
16 it's -- I guess the way you put it, Mr. Korzenik, is that the
17 question itself maps directly onto what is covered by the
18 privilege.

19 So I think to the extent, Mr. Genender, you are
20 seeking to compel certain information that you really need, you
21 need to reword your request or propound a different set of
22 requests that acknowledges my finding that the Defendant can
23 assert the reporter's privilege, right? So anything that's
24 going to break that privilege is not going to be permissible
25 and it will not require any kind of withholding of documents

1 because the privilege covers everything by definition. So I
2 get that point. That makes sense to me.

3 I also think, you know, to the extent that there's
4 room to just clarify, I hope we've done that today, but to
5 clarify whether the documents exist or not, it seems to me, at
6 least in document requests 11, 12, and 13, that the answers
7 were very clear. Those do not exist. And all the other stuff
8 is verbiage. And so you can ignore that. That doesn't negate
9 the clear answer, which is that those documents don't exist.
10 Right?

11 MR. GENENDER: Understood, Judge. And my
12 understanding then is with respect to the pre-11 requests, we
13 are to confer to see if we can narrow those down and get some
14 additional understanding as to what does and doesn't exist.
15 And if we need to propound more narrow or specified requests,
16 we are allowed to do that?

17 THE COURT: Yes. Except that -- let me just look at
18 those. Because #15 to me seems pretty clearly covered by the
19 privilege, right?

20 MR. GENENDER: I mean, just the ones before 11. The
21 numbers --

22 THE COURT: Yes.

23 MR. GENENDER: -- lower than 11.

24 THE COURT: 5, 6, 7, 8. Let me take a look at those.

25 What documents you possess reviewed in connection with the

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1 decision. I heard the response to that is those documents are
2 internal communications.

3 MR. KORZENIK: That's correct.

4 THE COURT: So that would all be covered by the
5 reporter's privilege. There's nothing there that needs to be
6 detailed.

7 MR. GENENDER: I was hopeful that we -- I mean, we
8 are now learning for the first time that these are documents
9 between Ms. Stevenson-Yang and I forget his name. Is it Mr.
10 Murray?

11 THE COURT: Mr. Murray.

12 MR. GENENDER: Mr. Murray. There's a case called
13 Murray, which is why I was having trouble with that. And we
14 would like the opportunity at least to see whether we
15 can -- now that we know what the communication is that's being
16 withheld to make the showing. We haven't had notice of what
17 any of these withheld documents were.

18 THE COURT: Yes. And that's part of the issue of the
19 privilege. The privilege passed a cloak over these
20 communications.

21 MR. GENENDER: Yes, Your Honor. But --

22 THE COURT: You can make your showing. You can make
23 your argument as to why they are highly material and relevant,
24 critical or necessary, and not obtainable from other sources.
25 I know it's difficult, but I mean, you have to do the best you

1 can.

2 MR. GENENDER: Well, I think what I would like to ask
3 the Court to let us do is digest this, perhaps confer with
4 counsel about -- now that we now have a better sense of what
5 does and doesn't exist, what is and isn't confidential, I mean,
6 it sounds like he's saying they are willing to state in these
7 responses that there's only confidential communications with
8 outsiders, no nonconfidential ones. And I understand the
9 Court's ruling that those are off limits. I get it. I
10 understand #15, the Court's ruling is off.

11 But on some of these other ones, we'd like to at
12 least find out a little bit more information about what the
13 internal communications were to see whether they come within
14 79-h now that we know they exist.

15 THE COURT: Well, if they're internal communications,
16 they do come within 79-h unless you can make your showing.

17 MR. GENENDER: And that's the discussion we'd like to
18 have. For example, if J Cap is able to say there are no
19 internal communications relating to funding with third-party
20 sources who were dictating what we would and wouldn't do, you
21 know, we can talk about whether or not that's something that
22 would resolve our issue.

23 The only other question, Your Honor, I believe is --

24 THE COURT: Well, hold on a second. I'm not sure
25 they need to even say that.

1 MR. GENENDER: I don't --

2 THE COURT: Because even if there were such
3 communication, I don't know that they need to tell you that
4 they exist.

5 MR. GENENDER: Understood, Your Honor. I think we
6 just have a disagreement about the scope of 79-h. If there
7 are --

8 THE COURT: Yeah.

9 MR. GENENDER: -- internal documents showing their
10 knowledge and state of mind and there's an allegation --

11 THE COURT: To actual malice?

12 MR. GENENDER: And actual malice. Yes.

13 THE COURT: Okay. Well, then make the argument about
14 actual malice. But I don't -- right?

15 MR. GENENDER: We will, Your Honor.

16 THE COURT: We don't have enough information. If you
17 want to make that argument, you can do that, but you haven't.
18 That's why I'm --

19 MR. GENENDER: Well, I believe --

20 THE COURT: -- denying your request.

21 MR. GENENDER: -- it's in our papers, Your Honor, but
22 I understand what the Court's saying. We did argue that it's
23 relevant and necessary for actual malice. There's no other way
24 to show it. Knowledge is key. And that's the Aquitaine (ph)
25 case.

1 I did have one other request for the Court.

2 THE COURT: Can I just say for that that you need to
3 be more specific about the specific request, not just that you
4 need information for actual malice. But to the extent that you
5 were making a specific request for specific documents, why
6 those specific documents are necessary to show actual malice.
7 That's what I'm missing.

8 MR. GENENDER: Understood, Judge. We will look at
9 that.

10 THE COURT: All right.

11 MR. GENENDER: The only other request which is not
12 addressed, I believe, is #14, which is about persons who paid
13 the money or inducement to prepare, revise, or publish the
14 report. I don't see how that's news. I don't think I heard
15 them argue that it's news. It's directly relevant to actual
16 malice.

17 THE COURT: So let's go back to this, Mr. Korzenik.
18 Okay. So in your explanation, what I'm hearing is, well,
19 people pay money to subscribe to our newsletter. I don't know
20 what you -- if that's fair to say. And so if people pay money,
21 are you talking about those people? And if so, no, we're not
22 giving you our subscriber list. That's not really relevant.

23 But if you're asking for other people who've paid
24 money, then that is also precisely the information that would
25 be privileged, not necessarily by 79-h but through the other

1 source which you called the anonymous speaker. Is that right?

2 MR. KORZENIK: That is correct.

3 THE COURT: Right. So I have not dug into the
4 anonymous speaker issue, so I'll have to look into that.

5 But --

6 MR. KORZENIK: They haven't either. That's the thing
7 that's --

8 THE COURT: Yeah.

9 MR. KORZENIK: -- remarkable to me. It's not that we
10 didn't notice it. We did.

11 THE COURT: And so I think if that's the issue then,
12 Mr. Genender, you would need to address that.

13 MR. GENENDER: Your Honor, the briefing talks about
14 it in the construct of the reporter's privilege showing that
15 it's a source and it's privilege.

16 THE COURT: But is it the reporter's privilege?

17 MR. GENENDER: I don't see the reporter's
18 privilege -- I don't see how it's news. That's the issue.

19 THE COURT: Well, but I've told you I've ruled that
20 the reporter's privilege does apply, so let's move on from that
21 point going forward.

22 MR. GENENDER: Yes, Your Honor. But for example, the
23 reporter's privilege -- if it was relevant and we asked them
24 for copies of their water bill, the reporter's privilege
25 wouldn't cover that. The reporter's privilege shouldn't cover

1 something which would impugn their editorial independence.
2 That is the point of request #14. It goes to the intent and
3 actual malice. We are doing this for money, not for the search
4 of truth. And --

5 THE COURT: Right.

6 MR. GENENDER: -- we're getting paid to do this. And
7 it's we're going to disregard -- it's relevant to whether or
8 not there is -- knowledge is false. We need you to say this.
9 Here's the money. Do it. And that would go to whether or not
10 they intentionally disregarded the truth. It's not a --

11 THE COURT: Can I just say that you're talking about
12 editorial independence. That is part of the analysis as to
13 whether the Defendant is a news organization. And I found
14 that, right?

15 MR. GENENDER: Yes, Your Honor. But it's also
16 independently relevant on the issue of malice, of actual
17 malice.

18 THE COURT: Okay. And that's my point is that I
19 don't see where you're speaking -- I'm denying the motion to
20 compel in its entirety now. And if you want to show actual
21 malice, then you can make that argument.

22 MR. GENENDER: Understood.

23 THE COURT: So I don't think that you have made that
24 showing to me at this point, but I'm giving you the opportunity
25 to make that showing if you think you want to give it another

1 try. But be more specific and not just say it's actual malice,
2 Judge, so we get it --

3 MR. GENENDER: Understood.

4 THE COURT: -- or we get this whole thing. The
5 pleadings maybe by necessity because of how much ground you
6 needed to cover were not very particular on it. And so that
7 has made it very difficult for me to make specific rulings on
8 the motion to compel because if I were to order you to compel
9 or order the Defendant -- compel the Defendant to turn over
10 documents in response to specific requests, those are very
11 specific.

12 And so I need to have the showing under 79-h that are
13 specific to each request and each thing you're seeking. Now,
14 in the course of doing that, you may come to realize, A, it's
15 already been answered or, B, it would be nice to have that
16 information, but it's not highly material and relevant or
17 critical and necessary, in which case if you can't make that
18 showing then you don't -- you know, you should move on.

19 MR. GENENDER: Understood, Judge.

20 THE COURT: I'm just asking for the specific argument
21 on each thing. And if it includes actual malice, then you also
22 need to be specific on each of those. So once you do that,
23 then the Defendant will have an opportunity also to oppose your
24 renewed motion to compel. Right?

25 So let's do it this way. Either you're going to
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1 renew your motion to compel with specific requests and you can
2 also narrow the requests that are currently there and clarify
3 what it is you're seeking. So for example, you might decide
4 that you want the information that was given to Defendant but
5 you don't really need the information or you can't make the
6 showing as to the information that the Defendant gave to
7 someone else. I think that was in one of the requests. So you
8 can do that and stick with the same document requests and
9 numbers that are at issue today.

10 Or if there are going -- well, let's just do it that
11 way. Why don't we do that because I think if I let you
12 propound different requests it's going to take us in a
13 completely different direction, and I don't think that's really
14 the right way to do it. So let me just limit you to you may
15 renew your motion to compel if you make specific showing and/or
16 narrow your request.

17 MR. GENENDER: Understood. Understood.

18 THE COURT: So how much time do you think you'll
19 need? I would like to put a deadline.

20 MR. GENENDER: I'm looking at my calendar. Can we
21 have 30 days?

22 THE COURT: All right. So today is August 11th. If
23 I give you 30 days, it's September 10th.

24 And then, Mr. Korzenik, how much time will you need
25 to respond?

1 MR. KORZENIK: I would ask for 30 days as well after
2 that. I don't know where that lands. I'm just concerned about
3 some of the Jewish holidays that are coming up. And I
4 don't --

5 THE COURT: I have that Rosh Hashanah starts on
6 September 6th. Yom Kippur is on September 15th. Sukkot starts
7 on September 20th.

8 MR. KORZENIK: Yeah. So if you put me a little
9 past -- and then I have a Media Law Conference at the end of
10 September. So if you could get me into the second week of
11 October, the beginning of that, I'd appreciate it.

12 THE COURT: All right. If I gave you 30 days,
13 October 10th is a Sunday for the Columbus Day weekend. So the
14 next business day is October 12th. I'll give you October 13th
15 just so you have --

16 MR. KORZENIK: Okay. All right.

17 THE COURT: -- one business day after the holiday.

18 MR. KORZENIK: Okay.

19 THE COURT: All right. So that's the response. And
20 then we'll take it from there. Now, we didn't get to the
21 interrogatories, but I think in light of everything that was
22 discussed, you can probably work those out. And that can be
23 wrapped into your motion to compel here as well.

24 MR. GENENDER: Understood, Judge.

25 THE COURT: Under your motion to compel.
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1 MR. GENENDER: We have plenty of guidance from the
2 Court. We know what to do.

3 THE COURT: All right. Good. So are there any
4 questions then, Mr. Korzenik, or anything else we should --

5 MR. KORZENIK: No. I think we'll work with that.

6 THE COURT: All right. Then, Mr. Genender,
7 everything's clear?

8 MR. GENENDER: Understood, Judge. Thank you so much
9 for your time this morning.

10 THE COURT: All right. Thank you, everybody.

11 MR. KORZENIK: Thanks very much, Your Honor.

12 MR. GENENDER: Thank you.

13 (Proceedings concluded)

14 CERTIFICATE

15 I certify that the foregoing is a correct transcript from
16 the record of proceedings in the above-entitled matter.

17
18
19 Dated: August 16, 2021

Carrie Clouse

Carrie Clouse, CET
Opti-Script, Inc.